Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-11–02 OF 2019(W)
TENGKU MAIMUN CHIEF JUSTICE, ZAWAWI SALLEH, IDRUS HARUN, NALLINI PATHMANATHAN AND ABDUL RAHMAN SEBLI FCJJ
28 MAY 2020

Labour Law — Employment — Whether appellant permanent employee of respondent or employed on fixed-term contract — Whether Industrial Court ('IC') and High Court (on judicial review) were entitled to lift corporate veils of entities whom appellant worked for to determine who his true employer was — Whether lifting of corporate veil was necessary to determine identity of employee's true employer to achieve social justice and protect rights and interests of employees — Whether Court of Appeal ('COA') had no reason to reverse findings of facts made by IC — Whether COA wrongly held that an expatriate who required work permit to work in Malaysia could never be a permanent employee — Whether employee's citizenship or fact that he had no valid work permit had no bearing in determining whether or not he was a permanent employee or that he had been dismissed without just cause or excuse

Three months after being appointed as a Consultant in AIMS Data Centre 2 Sdn Bhd ('ADC'), the appellant, an expatriate, was given a contract for consultancy services by ADC for a fixed term of one year. The contract entitled him to participate in a performance bonus scheme. Simultaneous with the granting of that contract, ADC appointed the appellant as its Vice-President, Product Development. Thereafter, without any change in the terms and conditions of his engagement, the appellant's contract was renewed annually over three consecutive years during which time ADC's merger with the respondent saw the respondent being reclassified as Consultant of the respondent and as Vice-President, Product and Solutions. When the time came for the appellant's contract to be renewed for the fourth year, the respondent decided to remove the appellant's entitlement to the performance bonus scheme. As this was not agreeable to the appellant, the respondent offered him a three-month work contract which the appellant refused to accept. The three-month contract stated that it would supersede all previous contracts which the appellant had had with ADC and the respondent and that the said contract was determinable by the giving of two months' notice. In purported exercise of that clause, the respondent gave the appellant two months' notice of termination of the contract. The appellant complained to the Industrial Relations Department that he had been unfairly dismissed from employment.

His case was referred by the Minister to the Industrial Court ('IC') for adjudication. The IC found that the appellant had been a permanent employee of the respondent all along and that he had been dismissed without just cause or excuse; that the purported 'fixed term contracts' were shams. The IC lifted the corporate veils of ADC and the respondent and found as a fact that the appellant worked for a group of companies as one enterprise; that his contract of employment had never been for a fixed term but had been a permanent and uninterrupted one which the respondent had renewed annually without the appellant having to apply for its renewal. The IC awarded the appellant back-wages and compensation in lieu of reinstatement. The High Court upheld the IC's decision and dismissed the respondent's judicial review application to quash the IC's award. The Court of Appeal ('COA'), however, set aside both the High Court's decision and the IC's award holding, inter alia, that: (a) the appellant was appointed under a three-month fixed-term contract (the COA disregarded the earlier contracts the appellant had had with ADC and the respondent) which was determinable by the giving of two months' notice; (b) the appellant never had continuity of employment because ADC and the respondent were separate legal entities; (c) in the absence of any allegation of fraud or unconscionable conduct, the IC and the High Court were wrong in lifting the corporate veils of ADC and the respondent to find that they were, in effect, a single unit; and (d) an expatriate who required a work permit to work in Malaysia could never be a permanent employee in Malaysia. The appellant was granted leave to appeal to the Federal Court against the COA's decision on two questions of law, namely: (i) whether a need for a work permit was a material consideration in determining whether an employment contract was a genuine fixed-term contract; and (ii) whether an employment contract which was renewed successively without application by the employee and without any intermittent breaks in between, was in reality a permanent employment.

Held, unanimously allowing the appeal, setting aside the COA's decision, reinstating the IC's award, answering the first leave question in the negative and the second leave question in the affirmative:

(1) The appellant's contract of employment was a permanent contract and not a fixed-term contract. The Industrial Court ('IC') found as a fact that the appellant worked for a group of companies as one enterprise. ADC and the respondent were part and parcel of the same group. There was 'an essential unity of group enterprise'. The COA was wrong in treating ADC and the respondent as two separate entities and in failing to treat the appellant's contract of employment as a continuous one from ADC to the respondent. The COA's failure to identify the employer-employee relationship ran contrary to the fundamental purpose of the Industrial Relations Act 1967 (see paras 44–45 & 85).

(2) The COA was wrong in reversing the findings of fact by the IC and in ruling that the appellant had accepted a three-month contract that was offered to him in September 2013. The facts clearly showed that the appellant did not accept the offer because the company had removed his entitlement to the performance bonus scheme in which he had participated since he commenced employment with the AIMS group of companies in 2009. The COA gave no reason for reversing the IC's finding that the appellant did not accept the three-month contract that was offered to him. There was no material error in the IC's findings of fact which justified the COA to reverse its decision. The findings of fact by the IC were amply supported by the evidence on record. An appellate court would not disturb the findings of fact made by the trial court as to the credibility of witnesses in view of the latter's audio-visual advantage and such findings would generally be accepted or acted upon unless it was shown that the trial court's decision was plainly wrong or was one that no reasonable judge or tribunal could have reached (see paras 46–47).

(3) Based on the factual matrix of the instant appeal, the appellant's contract of employment beginning with ADC until his termination under the respondent was not a one-off, seasonal or temporary employment; it was an on-going, continuous employment without a break from 2009–2013. The COA erred in not recognising the industrial law principle of lifting/piercing the corporate veil in the circumstances and the on-going nature of the appellant's contract of employment with both the companies (see para 67).

(4) The COA's decision that a foreign national could not have a permanent contract of employment could not withstand judicial scrutiny and was liable to be set aside. The fact that the appellant was a foreigner was irrelevant in determining whether his dismissal was with just cause or otherwise. The appellant's citizenship had no bearing in deciding whether he was in permanent employment or employed under a fixed-term contract. The Industrial Relations Act 1967 made no distinction between citizens of Malaysia and non-citizens. Furthermore, since Malaysia was party to the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975, all workers had to be treated with fairness, dignity and equality regardless whether they were locals or foreigners. This was also consonant with art 8(1) of the Federal Constitution which provided that all persons were equal before the law and were entitled to equal protection of the law (see paras 72, 80–84 & 87).

(5) The appellant's work permit was a non-issue in the instant appeal. It was neither pleaded in the respondent's statement in reply, nor raised in its submissions before the IC. The appellant's evidence before the IC that he had a valid Malaysian Working Pass and did not require a work permit

A from the respondent was not challenged. Further, the respondent's witness, COW1, admitted that the respondent had never applied for any work permit for the appellant. Since the work permit issue was never canvassed or ventilated, it was right for the IC and the High Court not to have considered the issue. Hence, the COA ought not to have dealt with B that issue at all, which, in any event, had no bearing in determining whether the appellant was a permanent employee or employed on a fixed-term contract (see para 86).

[Bahasa Malaysia summary

C Tiga bulan setelah dilantik sebagai Perunding di AIMS Data Center 2 Sdn Bhd ('ADC'), perayu, seorang ekspatriat, diberi kontrak untuk perkhidmatan perundingan oleh ADC untuk jangka masa tetap satu tahun. Kontrak tersebut memberi hak kepadanya untuk menyertai skim bonus prestasi. Serentak dengan pemberian kontrak itu, ADC melantik perayu sebagai Naib D Presidennya, Pembangunan Produk. Selepas itu, tanpa perubahan terma dan syarat pengambilannya, kontrak perayu diperbaharui setiap tahun selama tiga tahun berturut-turut di mana masa penggabungan ADC dengan responden menyaksikan responden diklasifikasikan semula sebagai Perunding responden dan sebagai Naib Presiden, Produk & Penyelesaian. Apabila tiba masa kontrak E perayu diperbaharui untuk tahun keempat, responden memutuskan untuk membuang hak perayu untuk skim bonus prestasi. Oleh kerana ini tidak dapat dipersetujui oleh perayu, responden menawarkan kepadanya kontrak kerja selama tiga bulan yang tidak diterima oleh perayu. Kontrak tiga bulan tersebut menyatakan bahawa ia akan menggantikan semua kontrak sebelumnya yang F dimiliki oleh perayu dengan ADC dan responden dan bahawa kontrak tersebut dapat ditentukan dengan notis dua bulan. Dengan menyatakan klausa tersebut, responden memberikan notis dua bulan kepada perayu untuk menamatkan kontrak. Perayu mengadu kepada Jabatan Perhubungan Perusahaan bahawa dia diberhentikan secara tidak adil dari pekerjaan. Kesnya G dirujuk oleh Menteri ke Mahkamah Perusahaan ('MP') untuk pengadilan. MP mendapati bahawa perayu telah menjadi pekerja tetap responden selama ini dan bahawa dia telah diberhentikan tanpa sebab atau alasan; bahawa kononnya 'kontrak jangka tetap' adalah palsu. MP mengangkat tadbir permerbadanan ADC dan responden dan mendapati bahawa hakikat bahawa perayu bekerja H untuk sekumpulan syarikat sebagai satu syarikat; bahawa kontrak pekerjaannya tidak pernah untuk jangka masa yang tetap tetapi merupakan kontrak tetap dan tidak terganggu yang mana responden telah diperbaharui setiap tahun tanpa perayu harus memohon pembaharuannya. MP memberikan gaji dan pampasan perayu sebagai pengganti pengembalian. I Mahkamah Tinggi membenarkan keputusan MP dan menolak permohonan semakan kehakiman responden untuk membatalkan award MP. Mahkamah Rayuan ('MR'), bagaimanapun, mengetepikan kedua keputusan Mahkamah Tinggi dan pemberian award MP, antara lain, bahawa: (a) perayu dilantik di bawah kontrak jangka waktu tiga bulan (MR mengabaikan kontrak

sebelumnya yang dimiliki perayu dengan ADC dan responden) yang dapat ditentukan dengan notis dua bulan; (b) perayu tidak pernah mempunyai kesinambungan pekerjaan kerana ADC dan responden adalah entiti undang-undang yang berasingan; (c) dengan ketiadaan tuduhan penipuan atau tingkah laku yang tidak masuk akal, MP dan Mahkamah Tinggi salah dalam mengangkat tadbir permerbadanan ADC dan responden untuk mengetahui bahawa mereka, sebenarnya, adalah satu unit; dan (d) ekspatriat yang memerlukan permit kerja untuk bekerja di Malaysia tidak pernah boleh menjadi pekerja tetap di Malaysia. Perayu diberi kebenaran untuk mengemukakan rayuan ke Mahkamah Persekutuan terhadap keputusan MR mengenai dua persoalan undang-undang, iaitu: (i) sama ada suatu keperluan untuk permit kerja adalah pertimbangan penting dalam menentukan sama ada kontrak pekerjaan adalah kontrak jangka tetap yang betul; dan (ii) sama ada kontrak pekerjaan yang diperbaharui berturut-turut tanpa permohonan oleh pekerja dan tanpa jarak diantaranya, sebenarnya pekerjaan tetap.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan MR, mengembalikan award MP, menjawab pertanyaan kebenaran pertama dengan negatif dan pertanyaan kebenaran kedua dengan afirmatif:

(1) Kontrak pekerjaan perayu adalah kontrak tetap dan bukan kontrak jangka tetap. Mahkamah Perusahaan ('MP') mendapati bahawa perayu bekerja untuk sekumpulan syarikat sebagai satu syarikat. ADC dan responden adalah sebahagian daripada kumpulan yang sama. Terdapat 'kesatuan penting kumpulan syarikat'. MR salah dalam memperlakukan ADC dan responden sebagai dua entiti yang berasingan dan gagal memperlakukan kontrak pekerjaan perayu sebagai kontrak berterusan dari ADC kepada responden. Kegagalan MR untuk mengenal pasti hubungan majikan-pekerja bertentangan dengan tujuan asas Akta Perhubungan Perusahaan 1967 (lihat perenggan 44–45 & 85).

(2) MR salah dalam membatalkan penemuan fakta oleh MP dan memutuskan bahawa perayu telah menerima kontrak tiga bulan yang ditawarkan kepadanya pada bulan September 2013. Fakta tersebut dengan jelas menunjukkan bahawa perayu tidak menerima tawaran itu kerana Syarikat telah membuang haknya untuk skim bonus prestasi di mana dia telah mengambil bahagian sejak dia mula bekerja dengan kumpulan syarikat AIMS pada tahun 2009. MR tidak memberikan alasan untuk membatalkan penemuan MP bahawa perayu tidak menerima kontrak tiga bulan yang ditawarkan kepadanya. Tidak ada kesalahan material dalam penemuan fakta MP yang membenarkan MR membatalkan keputusannya. Penemuan fakta oleh MP banyak disokong oleh keterangan dalam rekod. Mahkamah rayuan tidak akan mengganggu penemuan fakta yang dibuat oleh mahkamah bicara mengenai kredibiliti saksi memandangkan kelebihan audio-visual dan penemuan tersebut secara amnya akan diterima atau dipengaruhi kecuali

jika ditunjukkan bahawa keputusan mahkamah bicara adalah jelas salah atau tidak dapat dicapai oleh hakim atau tribunal (lihat perenggan 46–47).

(3) Berdasarkan matriks fakta rayuan ini, kontrak pekerjaan perayu bermula dengan ADC sehingga pemberhentiannya di bawah responden bukan pekerjaan sekali, bermusim atau sementara; ia adalah pekerjaan yang berterusan tanpa jarak dari tahun 2009 hingga 2013. MR terkhilaf kerana tidak menyedari prinsip undang-undang industri untuk mengangkat/menembusi tadbir permerbadanan dalam keadaan dan sifat kontrak kerja perayu yang sedang berjalan dengan kedua-dua syarikat (lihat perenggan 67).

(4) Keputusan MR bahawa warganegara asing tidak dapat memiliki kontrak pekerjaan tetap tidak dapat menahan penelitian kehakiman dan boleh diketepikan. Fakta bahawa perayu adalah orang asing tidak relevan dalam menentukan sama ada pemecatannya hanya dengan alasan adil atau sebaliknya. Kewarganegaraan perayu tidak ada kaitan dalam memutuskan sama ada dia bekerja tetap atau bekerja di bawah kontrak jangka tetap. Akta Perhubungan Perusahaan 1967 tidak membezakan antara warganegara Malaysia dan bukan warganegara. Tambahan lagi, sejak Malaysia menjadi anggota Konvensyen Pekerja Asing ILO (Peruntukan Tambahan) 143 tahun 1975, semua pekerja harus diperlakukan dengan adil, bermaruah dan sama rata tanpa mengira mereka adalah penduduk tempatan atau orang asing. Ini juga sesuai dengan perkara 8(1) Perlembagaan Persekutuan yang memperuntukkan bahawa semua orang sama di hadapan undang-undang dan berhak mendapat perlindungan undang-undang yang sama (lihat perenggan 72, 80–84 & 87).

(5) Permit kerja perayu adalah bukan isu dalam rayuan ini. Perkara itu tidak diajukan dalam pernyataan balas responden, dan juga tidak dikemukakan dalam hujahannya di hadapan MP. Keterangan perayu di hadapan MP bahawa dia mempunyai pas kerja Malaysia yang sah dan tidak memerlukan permit kerja dari responden tidak dicabar. Selanjutnya, saksi responden, COW1, mengakui bahawa responden tidak pernah memohon permit kerja untuk perayu. Oleh kerana isu permit kerja tidak pernah diteliti atau disuarakan, adalah tepat bagi MP dan Mahkamah Tinggi untuk tidak mempertimbangkan isu tersebut. Oleh itu, MR sama sekali tidak harus menangani isu itu, yang, dalam keadaan apa pun, tidak ada kaitan dalam menentukan sama ada perayu adalah pekerja tetap atau bekerja dengan kontrak jangka tetap (lihat perenggan 86).]

Cases referred to

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137; [1996] 4 CLJ 313, CA (refd)
Assunta Hospital v Dr A Dutt [1981] 1 MLJ 115, FC (refd)
Audrey Yeoh Peng Hoon v Financial Mediation Bureau [2015] 3 ILR 371 (refd)
Bagby v Gustavson International Drilling Co Ltd [1980] 24 AR 18, CA (refd)
Chandler v Cape Plc [2012] 3 All ER 640; [2012] EWCA Civ 525, CA (refd)
Charles Aseervatham Abdullah v The Zenith Hotel Sdn Bhd [2018] 2 LNS 2349, IC (refd)
Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41, PC (refd)
Dixon and another v British Broadcasting Corporation [1979] QB 546, CA (refd)
Downtown Eatery (1993) Ltd v Ontario [2001] OJ No 1879, CA (refd)
Esterhuizen v Million-Air Services CC (in liquidation) & Others [2007] 28 ILJ 1251 (refd)
Footwear Trading CC v Mdlalose [2005] 5 BLLR 452 (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Han Chiang High School/Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia & Industrial Court of Malaysia [1990] 1 ILR 473 (folld)
Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489, CA (refd)
Hasni Hassan & Ors v Menteri Sumber Manusia & Anor [2012] MLJU 1799; [2013] 6 CLJ 74, CA (refd)
Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, SC (refd)
Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam Mustafa [2006] 2 LNS 812 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)
Hotel Jaya Puri Bhd v National Union Of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (refd)
Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297, SC (refd)
Innoprise Corporation Sdn Bhd, Sabah v Sukumaran Vanugopal [1993] 1 ILR 373B (refd)
Inspector of Awards v Pacific Helmets (NZ) Ltd [1988] NZILR 411 (refd)
Jimsburg Services Sdn Bhd v Rostam Wahidin [1999] 2 ILR 324 (refd)
Law Kam Loy and Anor v Boltex Sdn Bhd and others [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)
Malaysia Airlines Bhd v Michael Ng Liang Kok [2000] 3 ILR 179 (refd)
Malaysia Shipyard and Engineering Sdn Bhd v Mukhtiar Singh & 16 Ors [1991] 1 ILR 626 (refd)

Manley Inc v Fallis [1977] 2 BLR 277 (refd)
McGraddie v McGraddie and another [2013] 1 WLR 2477, SC (refd)
Nacap Asia Pacific Sdn Bhd v Jeffrey Ronald Pearce & Anor [2011] 5 CLJ 791
Nasha'at Muhy Mahmoud v Malaysian Airlines System Bhd [2014] 1 ILJ 458; [2013] 2 LNS 1745, IC (refd)
Orakei Group (2007) Limited v Doherty [2008] NZEmpC 65 (refd)
Rusli Luwi v RM Top Holdings Sdn Bhd & Ors [2003] 4 MLRH 352, HC (refd)
Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)
Sime UEP Development Sdn Bhd v Chuah Poi [1996] 1 ILR 256 (refd)
Sinclair v Dover Engineering Services Ltd [1988] 49 DLR (4th) 297, CA (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 1 MLJ 87, PC (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 2 CLJ 641, FC (refd)
The New Straits Times Press (Malaysia) Bhd v Chong Lee Fah [2003] 2 ILR 239 (refd)
Thompson v Renwick Group plc [2014] EWCA Civ 635, CA (refd)
Toko Inomoto & Ors v Malaysian Phiharmonic Orchestra [2015] 2 LNS 1034, IC (refd)
Toko Inomoto & Ors v Malaysian Philarmonic Orchestra [2017] 1 LNS 201, HC (refd)
Wiltshire County Council v National Association of Teachers in Further and Higher Education and another [1980] ICR 455, CA (refd)

Legislation referred to

Federal Constitution art 8(1)
Industrial Disputes Act 1947 [IND]
Industrial Relations Act 1967 ss 2, 20, 30(5)
Interpretation Acts 1948 and 1967 s 3

Appeal from: Civil Appeal No W-02(A)-287–02 of 2017 (Court of Appeal, Putrajaya)

Alex De Silva (VK Raj and Tan Yang Qian with him) (Bodipalar Ponnudurai De Silva) for the appellant.
Vijayan Venugopal (Jamie Goh Moon Hoong with him) (Shearn Delamore & Co) for the respondent.

Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[1] The key issue in this appeal is whether the appellant/claimant was employed on a fixed term contract or was a permanent employee of the respondent at the material time. The Industrial Court and the High Court found that the appellant/claimant was a permanent employee of the

respondent and his dismissal from his employment was without just cause or excuse. On appeal, the Court of Appeal set aside the decision of the High Court and allowed the respondent's appeal.

[2] On 7 January 2019, this court granted the appellant/claimant leave to appeal on the following questions of law:

(a) whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed term contract; and

(b) does a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between, is in reality a permanent employment.

THE FACTUAL BACKGROUND AND ANTECEDENT PROCEEDINGS

[3] We do not propose to narrate the detailed factual background and antecedent proceedings of the case. They may be recounted in chronological order as follows:

End of 2008	The appellant/claimant was invited to join, invest and then became a shareholder of the AIMS Data Centre 2 Sdn Bhd ('ADC').
27 May 2009	The appellant/claimant received a letter of appointment from ADC for the position of the Consultant. The letter was signed by Gan Te-Shen, the Chief Executive Officer ('CEO') of ADC.
26 August 2009	The appellant/claimant received a contract for consultancy services from ADC for a fixed term ie, from 1 October 2009–30 September 2010 ('original contract'). On the same day, the appellant/claimant received a letter of appointment as Vice President Product Development of ADC, from 1 October 2009. According to this original contract, the appellant/claimant would be entitled for performance bonus scheme. The contract and the letter were signed by Gan Te-Shen, the CEO of ADC.
24 September 2010	The appellant/claimant received a renewal contract for a further period of 12 months from 1 October 2010–30 September 2011. All the terms and conditions of the contract remained unchanged. The letter was signed by Chiew Kok Hin, the CEO of ADC.

8 October 2011	The appellant/claimant received a renewal contract for a further period of 12 months, from 1 October 2011–30 September 2012. All the terms and conditions of the contract remained unchanged. The letter was signed by Chiew Kok Hin, the CEO of ADC.
11 October 2012	The appellant/claimant received a renewal contract for a further period of 12 months, from 1 October 2012–30 September 2013. All the terms and conditions of the contract remained unchanged. The letter was signed by Chiew Kok Hin, the CEO of ADC.
18 October 2012	The appellant/claimant received a renewal contract for a further period of 12 months from 1 October 2012–30 September 2013, as Consultant of AIMS Cyberjaya Sdn Bhd ('respondent') instead of ADC. This was due to the phasing out of ADC. All the terms and conditions of the contract remained the same as the original contract dated 26 August 2009. The letter was signed by Chiew Kok Hin, the CEO of the respondent.
7 January 2013	ADC was subsequently consolidated into the respondent. In view of the company structure, the appellant/claimant was re-designated to assume the position of Vice President, Product, & Solutions with effect from 1 January 2013 in the respondent. All the terms and conditions of the contract remained the same as the original contract dated 26 August 2009. The letter was signed by Chiew Kok Hin, the CEO of the respondent.
10 September 2013	The appellant/claimant was given a letter by the respondent offering him further employment from 1 October 2013–30 September 2014. However, the respondent sought to change the terms of the appellant's/claimant's employment by excluding the performance bonus scheme. The letter was signed by Chiew Kok Hin, the CEO of the respondent.
13 September 2013	The appellant/claimant had informed Chiew Kok Hin, the CEO of the respondent, that he was not agreeable to the new terms and conditions of the contract.
18 September 2013	The respondent renewed the appellant's/claimant's contract for a period of three months from 1 October–31 December 2013. The terms and conditions of the contract still remained unchanged ie excluding the performance bonus scheme. The letter was signed by Chiew Kok Hin, the CEO of the respondent.

1 October 2013	The appellant/claimant informed the respondent that he was unable to accept their offers, via an email.
18 October 2013	The appellant/claimant received a letter notifying him that the respondent gave him two months' notice of expiry of his contract from 1 November–31 December 2013. The respondent also informed the appellant/claimant that they had decided to grant him an early release from his employment with effect from 19 October 2013. The appellant/ claimant made a representation under s 20 of the Industrial Relations Act 1967. The reconciliation attempts before the Industrial Relations Department failed and the matter was subsequently referred to the Industrial Court for adjudication.
1 April 2016	The Industrial Court held that the appellant/claimant was a permanent employee of the respondent and the purported 'fixed term contracts' were not genuine fixed term contracts and the appellant's/claimant's dismissal was without just cause or excuse. The Industrial Court awarded back wages of 24 months and compensation of one and a half (1 1/2) month salary for each year of the appellant's/claimant's service in lieu of reinstatement.
1 July 2016	Dissatisfied with the award of the Industrial Court, the respondent filed a judicial review application to quash the Industrial Court's award.
6 January 2017	The High Court dismissed the respondent's application for judicial review.
27 January 2017	The respondent then appealed to the Court of Appeal.
30 November 2017	The Court of Appeal allowed the respondent's appeal and set aside the decision of the High Court and the award of the Industrial Court.
26 December 2017	The appellant/claimant then filed the notice of motion for leave to appeal to the Federal Court.
7 January 2019	Leave to appeal to the Federal Court was granted on twoquestions of law. The two questions of law are as stated in para [2] of this judgment.
28 November 2019	After perusing the appeal record, reading the written submissions and hearing oral submissions from both parties, this court allowed the appeal. The award of the Industrial Court was reinstated.

THE SECOND LEAVE QUESTION

[4] We will first deal with the second leave question which is the determinative and central question in this appeal. The issue whether the

appellant/claimant was employed on fixed term contract or was a permanent employee of the respondent is at the heart of the dispute between the parties.

[5] The appellant's/claimant's case before the Industrial Court was that his contract of employment with the respondent was permanent in nature and not a genuine fixed term contract. The Industrial Court found in favour of the appellant/claimant and vide its award dated 1 April 2016 concluded as follows:

> [45] Based on the totality of the evidence before this Court, the conclusion that is reached is that the claimant was a permanent employee of the Company and the purported 'fixed term contracts' were not genuine fixed term contracts. Since the Company had terminated the claimant on the ground that his contract had expired, the dismissal is therefore found to be without just cause and excuse.

[6] In arriving at its decision, the Industrial Court made the following findings of fact:

(a) all contracts of employment of the appellant/claimant were automatically renewed upon the initiative of the company and not based on any application by the appellant/claimant;

(b) the appellant/claimant was not a consultant but an employee of the company;

(c) the appellant's/claimant's function and position were not for a fixed duration but had an indefinite amount of time as was within the reasonable contemplation of parties; and

(d) there was no break in the appellant's/claimant's employment with the respondent as confirmed by the respondent's own witness in her testimony.

[7] The Industrial Court lifted/pierced the corporate veil of the respondent and held that the appellant/claimant was in fact a permanent employee and there was continuity of employment from ADC.

[8] The High Court affirmed the decision of the Industrial Court's award. On appeal, however, the Court of Appeal allowed the respondent's appeal. The Court of Appeal held, inter alia, that this was not a case where the corporate veil of the respondent ought to be lifted/pierced to reveal that the appellant/claimant was at all material times a permanent employee of the company since joining AIMS group of companies in 2009 as opposed to an employee on a fixed term contract.

[9] The nub of the Court of Appeal's reasoning is captured as follows at paras [16]–[17]:

[16] Established authorities have held that there must be special circumstances, where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity that warrants the lifting of the corporate veil by either the Industrial Court or the High Court (refer to *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355).

[17] There is no evidence that the facts of the instant case demonstrate fraud or unconscionable conduct of the Applicant and neither did the Learned High Court address this matter in her 'Grounds of Judgment'. Thus, there are no grounds for the Industrial Court or the Learned High Court Judge to lift the corporate veils of AIMS Data Centre 2 Sdn Bhd and the applicant, AIMS Cyberjaya Sdn Bhd to treat the two separate entities as one ie the applicant, AIMS Cyberjaya Sdn Bhd.

LIFTING/PIERCING THE CORPORATE VEIL

[10] Learned counsel for the appellant/claimant vehemently argued that the Court of Appeal had erred and/or failed to appreciate that the Industrial Courts would, in appropriate cases, more readily lift/pierce the corporate veil to reveal the true employer and prevent the employer from disclaiming responsibility for an employee. In support of his submission, reliance was placed on the Federal Court's decision in *Hotel Jaya Puri Bhd v National Union Of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 ('*Hotel Jaya Puri* case').

[11] Learned counsel further submitted that in the industrial jurisprudence, the mere description of a contract as a fixed term contract is not conclusive of whether an employee was indeed employed as such. The court is duty bound to enquire from the evidence adduced what was the real nature of the appellant's/claimant's employment and if there is a need to lift/pierce the corporate veil of the company, then this ought to be done to reveal the true nature of the appellant's/claimant's employment.

[12] Based on the evidence adduced before the Industrial Court, it was submitted that the Court of Appeal erred when it held that the veil of incorporation of ADC and the respondent could not be lifted/pierced to reveal that the appellant's/claimant's employment was in fact a continuous employment from the time he was employed in 2009 until his termination in October 2013.

OUR DECISION ON THE SECOND LEAVE QUESTION

[13] Put simply, 'lifting/piercing the corporate veil' means disregarding the dichotomy between a company and a natural person behind it and attributing liability to that person where he has misused or abused the principle of corporate personality. Since the decision of the House of Lords in *Salomon v A Salomon & Co Ltd* [1897] AC 22, which affirmed the legal principle that, upon incorporation, a company is generally considered to be a new legal entity

separate from its shareholders, the courts in Malaysia, England and other Commonwealth jurisdictions have found exceptions to the general principle stated in *Salomon* and have lifted/pierced the corporate veil to reveal those who controlled the company.

[14] The application of the doctrine of veil lifting/piercing the corporate veil is far from clear from case law. Professor Farrar has described the Commonwealth authority on piercing the corporate veil as 'incoherent and unprincipled' (see: J Farrar, *Fraud, Fairness and Piercing the Corporate Veil* (1990) 16 Canadian Business Law Journal 474, 478). It would appear that the circumstances in which the corporate veil may be lifted/pierced are greatly circumscribed and the courts tend to take a fact-based approached on the matter.

[15] Courts have recognised a number of factors that may lead to lifting/piercing of the corporate veil. Generally speaking, grounds under general law for lifting/piercing the corporate veil may be grouped into the following categories:

(a) agency;

(b) fraud;

(c) sham or façade;

(d) group enterprise; and

(e) unfairness/injustice.

These categories are probably not exhaustive. For the purpose of this instant appeal, categories (d) and (e) are relevant.

[16] A court may lift/pierce the corporate veil where the relationship between companies in the same group is so intertwined that they should be treated as a single entity to reflect the economic and commercial realities of the situation. An argument of 'group enterprise' is that in certain circumstances a corporate group is operating in such a manner as to make each individual entity indistinguishable, and therefore it is proper to lift/pierce the corporate veil to treat the parent company as liable for the acts of the subsidiary. Lifting/piercing the corporate veil is one way to ensure that a corporate group, which seeks the advantages of limited liability, must also accept the corresponding responsibilities.

[17] In the employment law perspective, the application of the 'single economic unit' test or 'functional integrality' test is particularly significant in ascertaining the continuity of employment for the scope of dismissal

protection (see *Manley Inc v Fallis* [1977] 2 BLR 277). It recognises the complexity of modern corporate structures and that the corporate veil must only be pierced in exceptional circumstances. On the other hand, such complexity should not be an obstacle to defeat the legitimate entitlements of wrongfully dismissed employees. This approach has its root on the general notions of fairness, equality and proportionality in the treatment of vulnerable employees. It serves to balance fairness with evolving commercial realities.

[18] One of the seminal cases in Malaysia on lifting/piercing the corporate veil is the *Hotel Jaya Puri* case. It was a decision in respect of judicial review application for certiorari against the decision by the Industrial Court ordering Hotel Jaya Puri Berhad ('the Hotel') to pay compensation of two months salaries plus fixed allowances in favour of workmen employed in the business of Jaya Puri Chinese Garden Restaurant Sdn Bhd ('the restaurant'). the restaurant, which was a fully owned subsidiary of the Hotel had 56 workers employed and operated its business at the hotel premises by paying a rental. Subsequently, the restaurant closed its business due to financial losses and the employees were retrenched. It resulted in an industrial dispute and the matter was referred to the Industrial Court. The employees claimed that they had been dismissed rather than retrenched as they were employees of the Hotel. The Industrial Court issued an award directing the Hotel to pay compensation.

[19] The Industrial Court found that the Hotel was in fact the employer of the workers and reasoned that:

(i) the hotel and the restaurant were inter-dependent;

(ii) there was functional integrality and unity of establishment between the hotel and the restaurant. In other words, functionally the hotel and the restaurant were in fact one integral whole and in terms of management, they also constituted a single unit; and

(iii) a number of senior officers including the secretary, personnel manager and assistant manager were common to both the hotel and the restaurant.

[20] On appeal, Salleh Abas FJ (as he then was) upheld the decision of the Industrial Court. His Lordship observed:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. *The court seems quite willing to lift the 'veil of incorporation' (so the expression goes) when the justice of the case so demands.* The facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in *Smith, Stone and Knight v Birmingham Corporation* [1938] 4 All ER 115; *Re FG (Films) Limited* [1955] 1

WLR 483; and *Firestone Tyre & Rubber Co v Llewelyn* [1957] 1 WLR 464.

...

In my judgment, *by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in Salomon v Salomon ... but rather gave effect to the reality of the Hotel and the Restaurant as being in one enterprise* ... In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account ... (Emphasis added.)

[21] The willingness of the Malaysian courts to lift/pierce the corporate veil by adopting the principle enunciated in the *Hotel Jaya Puri* case, particularly in the industrial disputes, is not new. In *Rusli Luwi v RM Top Holdings Sdn Bhd & Ors* [2003] 4 MLRH 352, the High Court found no difficulty in lifting the veil of incorporation, when the respondents, one of which was a subsidiary of the other, were operating as one business enterprise. Another example of this can be found in *Jimsburg Services Sdn Bhd v Rostam Wahidin* [1999] 2 ILR 324.

[22] In this instant appeal, the Court of Appeal, relying on the case of *Law Kam Loy*, held that the corporate veil of the respondent ought not to be lifted/pierced. Learned counsel for the appellant/claimant submitted that the Court of Appeal failed to properly consider the context in which the decision was made.

[23] We agree with the submission. If the case is properly considered, one would discover that the Court of Appeal in *Law Kam Loy* had endorsed that the Industrial Court may, in special and appreciate circumstances, lift of the corporate veil to reveal who is the proper employer, such as in a situation where there is actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. Gopal Sri Ram JCA (as he then was) stated as follows:

... But that is not to say that the court in the *Hotel Jayapuri* case was wrong in lifting the veil of incorporation of the facts of that case. *The Hotel Jayapuri case was concerned with the Industrial Relations Act 1967 which requires the Industrial Court to disregard the technicalities and to have regard to equity, good conscience and the substantial merits of a case. Accordingly, in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality. That is what happened in the Hotel Jayapuri case and no criticism of that case on its facts may be justified.* (Emphasis added.)

[24] In our considered opinion, the case of *Law Kam Loy* simply stands for the proposition that whilst the approach of the Supreme Court in the *Hotel Jaya Puri* case may not be suitable in present times (vis a vis current company law principles), the practice of the courts in lifting/piercing the corporate veil

may still be accepted in the realm of industrial relations as the correct approach to reveal who is the employer in the given case in order to achieve social justice so that the workmen are not adversely affected. In addition s 30(5) of the Industrial Relations Act 1967 provides that the court shall act according to 'equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'.

[25] In this connection, perhaps it would be useful to embark on a voyage cross other Commonwealth jurisdictions to look at persuasive authorities relevant to the issue under discussion.

SOUTH AFRICA

[26] In the South Africa, particularly in industrial and labour court matters, there has been willingness to pierce the veil. In the circumstance where the company is the agent or alter ego of its shareholders and directors, the courts are concerned with reality of the situation and not its form. In essence, what is important is the manner in which the company operated and with the individual's relationship to that operation. In the case of *Footwear Trading CC v Mdlalose* [2005] 5 BLLR 452 (LAC), Nicholson JA noted that:

> The abuse of juristic personality occurs too frequently for comfort and many epithets have been used to describe the abuse against which the courts have tried to protect third parties, namely puppets, shams, masks and alter ego. However, the general principle underlying this aspect of the law of lifting the veil is that, when the corporation is the mere alter ego or business conduit of a person, it may be disregarded. The lifting of the veil is normally reserved for instances where the shareholders or individuals hiding behind the corporate veil are sought to be responsible. I do not see why it should not also apply where companies and close corporations are juggled around like puppets to do the bidding of the puppet master.

[27] The Labour Appeal Court concluded that although Fila (PTY) Ltd and Footwear Trading CC were separate legal personalities, an expose of both entities would show that they were controlled by the same individuals and were inextricably interlinked, confirmed that they were in effect joint or co-employers.

[28] In *Esterhuizen v Million-Air Services CC (in liquidation) & Others* [2007] 28 ILJ 1251 (LC), the applicant had referred a constructive dismissal dispute to the Commission of Conciliation, Mediation and Arbitration ('CCMA') in 2001. The employer (first respondent) failed to appear at both conciliation and arbitration hearings. The CCMA found in favour of the applicant and awarded compensation. A warrant of execution was issued.

[29] When the deputy sheriff tried to execute the writ, he was informed by third respondent, the manager of Million-Air Services Carletonville (Pty) Ltd (second respondent) which had been incorporated in 2003, that the first respondent had been liquidated.

[30] The applicant applied to the Labour Court to declare that the second respondent was the same business operations as the first respondent and was liable, jointly and severally with the third respondent, to pay the amount awarded to the applicant in a CCMA award. Further, that it be declared that the third respondent was the real employer of the applicant and that he is liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA award.

[31] The Labour Court of South Africa found that there were policy considerations allowing the corporate veil be pierced to reveal who the true employer was. Francis J, in delivering the judgment of the court, held that the conduct of the third respondent was 'gravely improper'. The court found that the liquidation of the first respondent was a stratagem of the third respondent, in a deliberate attempt to thwart the employee's right to compensation. The third respondent had absolute control over both of the companies involved. He was the common denominator in the applicant's dismissal, the liquidation of the company, and the incorporation of the second company. The third respondent was the real employer and was liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA award.

CANADA

[32] The Canadian law recognises a doctrine known as the common employer doctrine. Under the doctrine, two or more legal entities can be employers of a person in relation to the same work where there is a sufficient degree of relationship between the different entities that act as common employers. What counts as a sufficient degree of relationship is determined on a case by case basis but includes 'factors such as individual shareholdings, corporate shareholdings, and interlocking directorships the essence of that relationship will be the element of common control' (see: *Sinclair v Dover Engineering Services Ltd* [1988] 49 DLR (4th) 297).

[33] The idea of common employers was first recognised in *Bagby v Gustavson International Drilling Co Ltd* [1980] 24 AR 18, but the test was not clearly stated until *Sinclair*. In *Sinclair*, the plaintiff was a professional engineer who wanted to bring a wrongful dismissal claim against two companies. One company, Dover Engineering Services Ltd ('Dover'), held itself out as his employer. Another company, Cyril Management Limited ('Cyril'), was

responsible for paying the plaintiff. Cyril also deducted all payments from the plaintiff's salary for income tax, unemployment insurance and his pension plan. Dover was owned by Mr Vernon Gould and Mr Donald Keenan. Cyril was effectively a management company that paid everyone who worked for Dover and the other companies owned by the Gould partnership.

[34] The court held both companies were the common employers of the plaintiff and it did not matter that the companies were in this complex business relationship with one another. Wood J stated:

> 16. I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.
>
> ...
>
> 18. As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract.

[35] The case of *Downtown Eatery (1993) Ltd v Ontario* [2001] OJ No 1879, had affirmed that the focus of the common employer doctrine was the relationship between the employers and not on the relationship between the employers and the employee. In this case, the plaintiff was a manger of a night club. He had been awarded damages for wrongful dismissal against his employer. However, his employer was insolvent. He sought judgment against all the companies involved in the nightclub enterprise, which he claimed belonged to the same corporate group. The court held that all the companies belong to one integrated unit and they were the plaintiff's joint employer.

[36] MacPherson JA stated that although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law.

NEW ZEALAND

[37] In New Zealand, the first acknowledgement of the concept of having two employers was in the case of *Inspector of Awards v Pacific Helmets (NZ) Ltd* [1988] NZILR 411. Chief Judge Horn stated:

> I see nothing in principle to prevent two people or firms joining together to employ one man for their respective purposes. And the more so when those purposes are closely associated.

[38] The acceptance of the concept of joint employers was confirmed by Shaw J, in the case of *Orakei Group (2007) Limited v Doherty* [2008] NZEmpC 65. The Employment Court confirmed that a person can be employed in the same employment by two or more companies; but there must be a sufficient degree of relationship between the legal entities for them to be joint employers. Common control by both employers would be usual in joint employment relationship.

THE UNITED KINGDOM

[39] In the context of employment law, there are two cases which highlighted the principle that a parent company could owe tortious liability for the health and safety of its subsidiary's employees, namely: *Chandler v Cape Plc* [2012] 3 All ER 640; [2012] EWCA Civ 525 and *Thompson v Renwick Group plc* [2014] EWCA Civ 635.

[40] In *Chandler*, the subsidiary's employee, who suffered from disorders caused by asbestos in the workplace, claimed damages against the parent company. The case appeared to be the first which actually imposed a duty of care to an employee of a company on that company's parent company. Arden LJ applied the three-stage test ie: (i) whether the damage was 'foreseeable'; (ii) whether there was 'proximity' between the parties; and (iii) whether it was 'fair, just and reasonable' to impose the duty on the party. As a result, Her Ladyship recognised the duty of care of the parent company either to advise its subsidiary about the steps to take or to ensure the implementation of these steps due to the parent's knowledge of the working condition and its superior knowledge about the risks. Her Ladyship summarised her judgment in para [69] as follows:

> [I]n appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

Although her approach could have the same effect as piercing the veil, Arden LJ rejected the view of this approach as 'veil-piercing'.

[41] In *Thompson*, the possibility of a direct duty of care owed by the parent company was again recognised with the criteria proposed by *Chandler*. However, the claim by the employee was rejected due to lack of sufficient evidence. Tomlinson LJ stated that the four factors mentioned by Arden LJ in *Chandler* were descriptive rather than exhaustive. Although the degree of fairness was as high as in *Chandler*, Thomlinson LJ rejected the claim of the plaintiff as there was no evidence of the parent's knowledge and control related to foreseeability and proximity. Hence, the parent company's direct duty of care could not be recognised.

[42] From a short review of cases above, it would appear that although the principle of separate legal entity is at the core of the company law, there are a number of situations in which a corporate group and its members can be treated the same. In other words, while the dicta in *Hotel Jaya Puri* case is correct in substance particularly in the context of industrial jurisprudence, the approach of 'common employer' taken by the Canadian, South African and English courts better explains the rationale in industrial law terms in order to achieve equity and social justice. This is in keeping with the tenor and purpose of the Industrial Relations Act 1967.

[43] In sum, insofar as employment law is concerned, the circumstances which are believed to be most peculiar basis under which the court would lift/pierce the corporate veil and find a group of companies to be common employers include:

(a) where there is 'functional integrality' between entities;

(b) unity of establishment between the entities.

(c) the existence of a fiduciary relationship between the members of the entities and/or the extent of control;

(d) there was essential unity of group enterprise; and

(e) whenever it is just and equitable to do so and/or when the justice of the case so demands.

But these circumstances are just guidelines and are by no means being exhaustive. The circumstances for which the court may lift/pierce the corporate veil are never closed.

[44] Reverting back to the mainstream of the present appeal, we are of the considered opinion that ADC and the respondent were part and parcel of the same group. There was 'an essential unity of group enterprise'. The uncontroverted evidence established that:

A (a) the appellant's/claimant's original contract of employment with ADC was dated 26 August 2009;

(b) vide letter dated 11 October 2012, ADC informed the appellant/claimant that his contract as consultant will be renewed for another 12 months from 1 October 2012 to 30 September 2013;

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(c) however, vide letter dated 18 October 2012 from the respondent, the appellant/claimant was informed that his contract as a consultant will be renewed under the respondent, instead of ADC. Further, it was expressly stated that there will be no change in his designation, grade and other terms and conditions of his contract dated 26 August 2009;

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(d) in the letter dated 18 October 2012, the respondent expressly stated that the appellant's/claimant's contract is being renewed under the respondent instead of under ADC in view of the phasing out of ADC;

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(e) the chief executive officer of ADC who signed the letter dated 11 October 2012 and the Chief Executive officer of the respondent who signed the letter dated 18 October 2012 (ie seven days later) were one and the same — Mr Chiew Kok Hin;

E (f) it was a finding of fact by the Industrial Court that ADC was consolidated into the respondent and vide a letter dated 7 January 2013, in view of the new company structure, the appellant/claimant had been re-designated to assume the post of VP, Product and Solutions with effect from 1 January 2013;

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(g) it was a finding of fact by the Industrial Court that the appellant/claimant continued to report to Mr Chiew Kok Hin before and after the letter dated 18 October 2012; and

(h) it was a finding of fact by the Industrial Court that according to the testimony of the respondent's witness (COW1) the appellant's/claimant's contract with ADC allowed for the appellant/claimant to be moved to any of its subsidiaries and/or associate companies. Thus, the appellant/claimant was asked to assume the position of VP, Product & Solutions with the respondent on 7 January 2013.

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[45] For all the aforesaid reasons, we are of the considered view the Court of Appeal was wrong when it held that ADC and the respondent were two separate legal entities and failed to treat the appellant's/claimant's contract of employment as a continuous one from ADC to the respondent. In our view, the doctrine, whether is categorised as 'essential unity group enterprise' or 'common employer', its purpose is to permit the corporate veil to be pierced in order to establish or identify the true labour relationship between parties in terms of the existing labour relation realities. The Court of Appeal's failure to identify the employer-employee relationship runs contrary with the

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fundamental purposes of the Industrial Relation Act 1967.

[46] Further, the Court of Appeal was wrong in reversing the findings of fact by the Industrial Court and ruled that the appellant/claimant had accepted a three months contract that was offered to him in September 2013. The facts clearly showed that the appellant/claimant did not accept the offers because the company had removed his entitlement to the performance bonus scheme in which he was a participant at all material times since he was in employment with AIMS group of companies in 2009.

[47] It is an established rule, enunciated in a long line of decisions, that the appellate court will not disturb the findings of fact made by the trial court as to the credibility of witnesses in view of its opportunity to observe the demeanor and conduct of witnesses while testifying and the said findings will generally be accepted or acted upon unless it can be demonstrated that the trial court's decision is plainly wrong or the decision is one that no reasonable judge or tribunal could have reached (see: *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87; *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 2 CLJ 641, *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600; *McGraddie v McGraddie and another* [2013] 1 WLR 2477). We observe that the Court of Appeal did not proffer any reasons whatsoever in revising the Industrial Court's finding that the appellant/claimant did not accept the three months contract that was offered to him. In our considered opinion, there is no material error in the findings of fact by the Industrial Court which justifies the Court of Appeal to reverse its decision. The findings of fact by the Industrial Court are amply supported by the relevant evidence on record.

FIXED TERM CONTRACT OR PERMANENT EMPLOYEE

[48] We now turn to the issue on whether on the facts and circumstances of the present appeal, the appellant/claimant was employed on a fixed term contract or was a permanent employee of the respondent.

[49] The Court of Appeal had considered the issue of fixed term contract in the light of its decision on the issue of separate legal entity. The Court of Appeal concluded that it was wrong for the Industrial Court and the High Court to have lifted the corporate veil based on the facts of the present appeal. The Court of Appeal disregarded the earlier contracts of employment between the appellant/claimant and ADC.

[50] The Court of Appeal held that the appellant/claimant was appointed

under a fixed term contract of three months and that early termination of the appellant's/claimant's contract employment was affected in accordance with cl 8 of the appellant's/claimant's contract of employment dated 18 September 2013 which provides as follows:

> 8. Termination
>
> Your appointment may be terminated by giving two (2) months notice. Such notice shall be given by the party that intends to effect the determination. Where no notice is given, two (2) months salary in lieu of notice shall be payable by the party effecting such termination.

[51] Clause 1(e) of the same contract of employment provides as follows:

> This contract shall supersede all other contracts previously issue under AIMS Data Centre 2 Sdn Bhd and AIMS Data Centre Pte Ltd.

[52] It was submitted on behalf of the respondent that the Court of Appeal was right in holding that there was no continuity of employment because the two companies were two separate legal entities. It was further submitted that even if a contract of employment was renewed successively without any application by the employee and without any intermittent breaks in between, this did not change the character and nature of a fixed term contract into a permanent contract. And cl 1(e) of the appellant's/claimant's contract of employment shows that there is no continuity between the appellant's/claimant's contract of employment and his past fixed term contracts.

OUR DECISION

[53] Security of tenure in employment or job security is recognised by our Malaysian courts (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137; [1996] 4 CLJ 313, *The New Straits Times Press (Malaysia) Bhd v Chong Lee Fah* [2003] 2 ILR 239). This right however, has to be balanced with the employer's prerogative to make commercial decisions for reasons of better economy or better management (see *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489, *Malaysia Shipyard and Engineering Sdn Bhd v Mukhtiar Singh & 16 Ors* [1991] 1 ILR 626).

[54] The use of fixed term contract employee had become a trend in Malaysia, particularly in the employment of expatriates and also in the construction industry where employees are commonly engaged on a project basis. A fixed term contract is a contract of employment for a specific period of time ie with a defined end (see: *Wiltshire County Council v National Association*

of Teachers in Further and Higher Education and another [1980] ICR 455). As a general rule, such contract cannot be terminated before its expiry date except for gross misconduct or by mutual agreement. However, a contract can still be for a fixed-term if it contains within it a provision enabling either side to terminate it on giving notice before the term expires (see: *Dixon and another v British Broadcasting Corporation* [1979] QB 546). In this connection, the main issue that presents itself is whether there is a genuine fixed term contract or there is an employment on a permanent basis dressed up as several fixed term contracts.

[55] The judicial treatment regarding the question of whether an employer had a genuine need for the service of an employee for a fixed duration may be divided into three consideration points:

(a) the intention of parties (see *Han Chiang High School/Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia & Industrial Court of Malaysia* [1990] 1 ILR 473, *Hasni Hassan & Ors v Menteri Sumber Manusia & Anor* [2012] MLJU 1799; [2013] 6 CLJ 74);

(b) employers' subsequent conduct during the course of employment (see *Innoprise Corporation Sdn Bhd, Sabah v Sukumaran Vanugopal* [1993] 1 ILR 373B, *Sime UEP Development Sdn Bhd v Chuah Poi* [1996] 1 ILR 256, *Malaysia Airlines Bhd v Michael Ng Liang Kok* [2000] 3 ILR 179, *Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam Mustafa* [2006] 2 LNS 812); and

(c) nature of the employer's business and the nature of work which an employee is engaged to perform (see *Audrey Yeoh Peng Hoon v Financial Mediation Bureau* [2015] 3 ILR 371, *Charles Aseervatham Abdullah v The Zenith Hotel Sdn Bhd* [2018] 2 LNS 2349).

THE INTENTION OF PARTIES

[56] In the *locus classicus* case on fixed term contract, *Han Chiang High School*, the court distinguished between a genuine fixed term contract and one which is a sham. In this case, the material facts are that the school had employed teachers on fixed term contracts of two years. A number of teachers who had joined the Union of Teachers in Independent Schools were informed that their employment would cease upon expiry of the fixed term contract. The Union applied to the High Court for an interlocutory injunction restraining the school from terminating the services of the teachers. The High Court granted the injunction but the then Supreme Court subsequently set aside the injunction because the forum to deal with complaints of wrongful dismissal was the Industrial Court. After the injunction was set aside, the school proceeded to inform the teachers that their service was no longer required. The

teachers claimed that they were dismissed without just cause and excuse.

[57] The Industrial Court held that although there might have been a genuine need for fixed term contracts when the school was first inaugurated in 1951, there did not appear to be such a need when it had been successfully established as some of the teachers had taught for more than 20 years and had their contracts renewed unfailingly during those years. In holding that the fixed term contracts were not genuine, the Industrial Court stated that the system of fixed term contracts in the school was employed not out of genuine necessity, but as a means of control and subjugation of its teaching employees.

[58] In *Hasni Hassan*, five employees were migrated to fixed term contracts in 2003 as part of a transformation plan to improve the performance of government-linked companies, which in this case Telekom Malaysia Bhd ('Telekom'). Telekom, had offered all senior management officers the option of either remaining under current terms as permanent employment or to accept fixed term contracts. In order to accept the fixed term contracts, the employees would have to resign from their permanent employment.

[59] The dispute arose when five of those officers did not have their fixed term contracts renewed. They lodged a complaint under s 20 of the Industrial Relations Act 1967, but the Minister declined to refer the matter to the Industrial Court. The employees applied for judicial review of the Minister's decision. At the High Court, the decision of the Minister was upheld. Three of the five employees appealed to the Court of Appeal, which allowed the appeal and referred the matter to the Industrial Court for adjudication.

[60] Even though the Court of Appeal held that it is for the Industrial Court to decide the matter on merit (genuineness of the fixed term contract), the Court of Appeal went further and stated that the Telekom had genuine intentions when they offered the fixed term contracts to their senior management as their intention was to increase performance and productivity and, as reward, the senior management would be able to earn higher incomes. The Court of Appeal also stated that this was part of a business plan and there was no ulterior or sinister motive on the part of the Telekom when they offered the fixed term contracts and the fixed term 'was not a guise to shorten the employment of the employees previously on permanent contracts'.

EMPLOYERS' SUBSEQUENT CONDUCT DURING THE COURSE OF EMPLOYMENT

[61] We have the opportunity to review several cases decided by the Industrial Court on this issue and we agree with the approach adopted that in determining whether a contract of employment is a fixed term contract or

permanent employment, the employer's subsequent conduct during the course of employment is a relevant consideration. The total duration or length of service with an employer is also a factor that would be considered.

[62] In the case *Sime UEP*, a clerk was employed for four years on a contract that was renewed annually. During his four years there, the employee was involved in various projects. The Industrial Court held that an employee cannot be considered to be employed for a temporary or one-off job if he was not employed for a particular project and he had been involved in various projects during his tenure.

[63] In the case of *Malaysia Airlines*, the employee was engaged on a fixed term contract of two years as second officer in the Rural Air Service. He was confirmed in his position as second officer two months later. Eight months into his employment, he was promoted as a commander and was confirmed in that position after serving a probationary period of six months. His fixed term contract was subsequently renewed twice, each time for three years. When the employee wrote to the company on the forthcoming expiry of his third fixed term contract, he was given a three-month contract by the company. The Industrial Court, in finding that the employee's employment had been permanent, considered that the Rural Air Service was not a temporary operation and that it did not have a definite duration beyond which the cessation of the business is inevitable.

[64] The next case is *Holiday Villages*. In this case, a resort employed both seasonal and permanent employees. Seasonal employees had a fixed term in their contracts which would range from three to six months or for a season. The resort was not open for the whole year and would be closed during the monsoon season which falls between November and January of each year. The employee had begun employment on a fixed term contract for one season. He was subsequently employed for six consecutive seasons. The Industrial Court acknowledged that the resort was only open for nine to ten months in a year and that there was a genuine need for fixed term contracts as it was inconceivable to expect the resort to pay salaries when it was closed.

[65] Notwithstanding the genuine need for fixed term contracts, the Industrial Court found that the employee was, by the last fixed term contract in the series of fixed term contracts, a permanent employee of the resort as:

(a) he was employed even during the off-season as a laundry supervisor;

(b) he was given a new contract without the need to reapply; and

(c) he was able to continue in employment even after the alleged expiry of his penultimate fixed term contract without an extension.

A NATURE OF THE EMPLOYER'S BUSINESS AND THE NATURE OF WORK WHICH AN EMPLOYEE IS ENGAGED TO PERFORM

[66] Factors that determine the true character of a fixed term contract may also include the nature of the employer's business and the nature of the work which an employee is engaged to perform. In *Charles Aseervatham Abdullah v The Zenith Hotel Sdn Bhd* [2018] 2 LNS 2349, a similar issue with the present appeal arose for the court determination: whether or not an employee who had worked for three separate entities over several years was on a fixed term contract. In arriving at its award, the Industrial Court examined the entirety of the claimant's employment history, and came to conclusion that the contract was not a genuine fixed term contract.

[67] With the principles outlined above in mind and based on the factual matrix of the instant appeal, we are satisfied that the appellant's/claimant's contract of employment beginning with ADC before being terminated under the respondent, was not one-off, seasonal or temporary employment. It was ongoing, continuous employment without a break from 2009–2013. In our considered opinion, the Court of Appeal erred in not recognising the industrial law principle of lifting/piercing the corporate veil in the circumstances and the ongoing nature of the appellant's/claimant's contract of employment with both the companies.

OUR DECISION ON THE FIRST LEAVE QUESTION

[68] We now turn our attention to the first leave question. The Court of Appeal held that an expatriate who requires a work permit to work in Malaysia can never be a permanent employee in Malaysia, relying on *Nasha'at Muhy Mahmoud v Malaysian Airlines System Bhd* [2014] 1 ILJ 458; [2013] 2 LNS 1745 and *Toko Inomoto & Ors v Malaysian Phiharmonic Orchestra* [2015] 2 LNS 1034.

[69] Learned counsel for the appellant/claimant mounted a spirited attack on the decision of the Court of Appeal in respect of this issue. Learned Counsel argued that the Court of Appeal ought to have referred to the Federal Court case of *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115 which held that the citizenship of an employee has no bearing in deciding whether the applicant was in permanent employment or under a fixed term contract.

[70] We agree with the submission. In *Assunta Hospital*, Dr Dutt was an Indian citizen and was engaged as a radiologist in the Assunta Hospital, on a three-year contract, which was renewed without any break a number of times. Later, the Dr's contract was terminated. The Industrial Court awarded a sum of RM522,000 as compensation in lieu of reinstatement. In the Federal Court,

the employment contract of Dr Dutt was not an issue but the court did make an observation that the last letter of appointment described the period of engagement as 'permanent' and that there was no doubt that the contract offered a certain security of tenure. On the citizenship matter, the court had these to say:

> As for the non-citizenship status of Dr Dutt, we shared the astonishment of the judge at the relevance of this point. Our views can be stated shortly; *whether Dr Dutt can get an extension of his visit-pass so as to be able to stay in this country or the issue of a work-permit in order to be able to take up the appointment are not matters that can influence the court in the proper exercise of the jurisdiction conferred on it by the Minister's reference of the representations for reinstatement. If an order is made ordering reinstatement and the workman is unable to obtain either the visit pass or the work-permit, the employer would not be in contempt of the order. It is for the workman to make the order effective. All that the hospital had to do is to make the post available to the workman*. As for any suggestion that the order for reinstatement would influence the Ministry of Home Affairs to issue the visit pass or the work-permit, there cannot be any truth in it, and it cannot possibly be said that the Ministry of Home Affairs is bound to comply with the order for reinstatement. In any event, it is of no concern to the hospital. (Emphasis added.)

[71] In *Toko Inomoto & Ors v Malaysian Philarmonic Orchestra* [2017] 1 LNS 201, one of the issues that was dealt with by the learned High Court judge was whether or not an employee's citizenship is a material consideration in deciding whether an employment is on a permanent basis. The Learned High Court judge took the view that the issue of the citizenship is not a material consideration. At para 223 of the judgment, the learned judge said:

> I agree with the counsel for the applicant that *the issue of citizenship was not a material consideration for the Industrial Court to take into account*. (Emphasis added.)

[72] In our view, the proposition of law propounded above is correct in law. The citizenship of the appellant/claimant has no bearing in deciding whether the appellant/claimant was in permanent employment or in employment under a fixed term contract. We also note that the Industrial Relations Act 1967 does not make any distinction between the citizens of Malaysia and non-citizens.

[73] At this juncture, it is pertinent to consider the definition of 'workman' in s 2 of the Industrial Relations Act 1967:

> 'workman' means any person, including an apprentice employed by an employer under a contract of employment to work for hire or reward, and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

[74] According to this definition, a workman is 'any person' employed under 'a contract of employment', and in the case of a 'trade dispute', he is a person whose dismissal, discharge or retrenchment from employment leads to or is the cause of the dispute. But what is the meaning of any 'person', 'contract of employment' and 'trade dispute'?

[75] The word 'person' is interpreted in s 3 of the Interpretation Acts 1948 and 1967 (Act 388), as including body of person, corporate, or unincorporated.

[76] 'Contract of employment' is defined by the s 2 of the Industrial Relations Act 1967 as 'any agreement whether oral or in writing and whether express or implied, whereby the person agrees to employ another as a workman and that other agrees to serve his employer as a workman'.

[77] Meanwhile, 'trade dispute' is defined in s 2 of the Industrial Relations Act 1967 to mean 'any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment, or conditions of work of any such workmen'.

[78] It is a pertinent to understand the combined effects of these definitions. Salleh Abas LP in the case of *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297 said:

> *The combined effect of these definitions is that a person is a workman if the contract of employment under which he is employed requires him to serve his employer as a workman and in the case of a trade dispute a person is a workman if the dispute between him and his employer is connected with his employment as a workman*. The definition, therefore, does not go very far and in fact it goes in circle. I am still left with the same question: who is a workman? But one thing is clear in that whilst a contract of employment is part of the definition, *it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed as a workman. If he is employed in other capacity he cannot be a workman.*
>
> ...
>
> Now let me turn to the definition of workman in our IRA. Although it may appear to be wide, in fact it is limited by its own definition of contract of employment, which means any agreement whereby (an employer) agrees to employ his employee as 'a workman', and the (other employee) agrees to serve his employer, (also) as 'a workman'. We were urged to disregard the expression 'as a workman' as being a mere labelling. I cannot agree. *I have no right to treat it as mere surplusage.* It was included there for good measure just as the words 'or otherwise' in the National Arbitration Tribunal case (supra) were held to extend the definition beyond the natural and common sense meaning of the word 'workman'. *In my view the expression 'as a workman' indicates the intention of the legislature in that in construing the term*

'workman', the purpose for which a person is employed must be taken into consideration. In other words, the function and responsibility of an employee are the criterion and must be looked into. (Emphasis added.)

[79] Further, in *Assunta Hospital*, the Federal Court also upheld the finding of the Industrial Court that, Dr A Dutt, a professional radiologist, who was employed under a contract of service was a workman. The court rejected the narrow definition of workman adopted by Indian courts because the expression 'in any industry' which is part of the statutory definition of workmen in Indian Industrial Disputes Act 1947 is conspicuously absent from the definition under our Industrial Relations Act 1967.

[80] One other important point to note is that Malaysia is a member country of International Labour Organisation ('ILO'). Article 10 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975, states:

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and *practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory*. (Emphasis added.)

[81] This ILO Convention, to which Malaysia is a party, expressly provides that states should undertake to promote and guarantee equality of opportunity and treatment between migrant workers and nationals.

[82] This ILO standards apply to migrant workers and nationals equally. In *Nacap Asia Pacific Sdn Bhd v Jeffrey Ronald Pearce & Anor* [2011] 5 CLJ 791, the learned judge referred to article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 and stated:

This ILO Convention, to which Malaysia is a party, expressly provides that where laws and regulations which control the movement of migrants for employment — such as the Immigration Act — have not been respected, *the migrant worker shall nevertheless enjoy equality of treatment in respect of rights arising out of past employment. This is the international labour standard prescribed by the ILO*. (Emphasis added.)

[83] Based on the above reasons, we take the view that all workers should be treated with fairness, dignity, and equality without distinction whether they are local or foreigners. This is also consonant with art 8(1) of the Federal Constitution which essentially provides that all persons are equal before the law and entitled to the equal protection of the law.

[84] In our judgment, the decision of the Court of Appeal that a foreign national cannot have a permanent contract of employment cannot withstand judicial scrutiny and is liable to be set aside.

CONCLUSION

[85] We say that the *Hotel Jaya Puri* case is still good law. The Industrial Court made a finding of fact that the appellant/claimant work for one group of companies as one enterprise. Applying the principles enunciated in *Han Chiang*, we find that the appellant's/claimant's contract of employment is a permanent contract and not a fixed term contract.

[86] The work permit is a non-issue in the present appeal. The work permit was not pleaded in the respondent's statement in reply filed at the Industrial Court. The respondent also did not raise the matter in its submission before the Industrial Court. The appellant's/claimant's evidence in the Industrial Court that he had a valid Malaysian working pass and did not require a work permit from the respondent was not challenged. Further, the respondent's witness, COW1, admitted that the respondent had never applied any work permit for the appellant/claimant. Since the work permit issue was not canvassed and ventilated, it was right for the Industrial Court and the High Court not to consider this issue. It is trite that parties are expected to put before the trial court all questions both of fact and law upon which they wish to have an adjudication. Parties to litigation are entitled to know where they stand and tailor their expenditure and efforts in dealing only with what is known to be in dispute. In our considered view, the Court of Appeal ought not to have dealt with the issue at all and should have allowed it to enjoy its eternal sleep. In any event, it has no application in determining whether the appellant's/claimant's contract was a fixed term contract or whether he was a permanent employee.

[87] In the circumstances of the present appeal, the fact that the appellant/claimant is a foreigner is irrelevant in determining whether the dismissal is with just cause or otherwise.

[88] For all the foregoing reasons, the questions posed for our determination are answered as follows:

(a) whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed term contract; and

In the negative;

(b) does a contract of employment which is renewed successively without

application by the employee and without any intermittent breaks in between, is in reality permanent employment?

In the affirmative.

[89] Consequently, the appeal is allowed with costs. So ordered.

Order accordingly.

Reported by Ashok Kumar